



The stipulations, as specifically set forth in the Award of the Special Administrative Law Judge, are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Is claimant entitled to future medical expense?

Claimant's average weekly wage was at issue before the Special Administrative Law Judge. Special Administrative Law Judge William F. Morrissey found claimant's wage to be \$246.77. This finding has not been challenged by either party and shall be adopted by the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a fifty-two (52) year old mechanic and installer, was injured while working for respondent on January 29, 1991, when he slipped and fell on ice in a parking lot. Claimant completed the work day but the next morning awoke with pain in his lower back and legs. He experienced difficulty walking, bending and standing for long periods. Prior to this injury, claimant would lift up to one-hundred (100) pounds occasionally, and fifty (50) pounds on a daily basis, all without pain.

Claimant continued to work, with his condition becoming progressively worse, until February 21, 1991. Claimant was treated by Dr. Henry Marsh, a board-certified orthopedic surgeon in Wichita, Kansas. After a period of conservative care, Dr. Marsh returned claimant to work with a diagnosis of degenerative low back disease in the L4-5 region. An MRI performed in 1991 indicated degenerative changes in the L4-5 region of the lumbar spine. There was some disc bulging at L4-5, L5-S1. The tests indicated no protrusion or impairment upon the nerve root. He was off work from February 21, 1991, until March 31, 1991, at which time he was returned to work by Dr. Henry Marsh. Claimant continued to complain of pain in his back and legs for approximately one month after returning to work. After returning to work, claimant continued to do his regular job through October 11, 1991, at which time he was terminated due to a sales slow down. For most of the time claimant was employed with the respondent he did his regular job without complaints or indications of difficulties. The respondent at no time was required to provide claimant any additional help or accommodation.

Subsequent to his layoff in October 1991, claimant collected unemployment, until his benefits ran out. Shortly thereafter, in late summer, 1992, claimant began his own sandblasting business, specializing in small parts and art work. Claimant admitted he was physically capable of doing this for a period of time after which he would be required to get up and stretch. He charged \$40.00 per hour for his work as a sandblaster.

Claimant was examined in January 1993, by Dr. Anthony Pollock, a Wichita-based orthopedic surgeon. Dr. Pollock recommended additional testing, including a repeat MRI. The February 1993 MRI indicated ventral extradural findings at L4-5 on the right and at L5-S1, with a suspicious ventral extradural visualization at L3-4. Dr. Pollock diagnosed

degenerative desiccation of the nucleus pulposus at L2-3, L3-4, L4-5, and L5-S1. He then recommended a CT scan which indicated spinal stenosis. In comparing the MRI from 1991 to the one in 1993, Dr. Pollock found the L4-5, L5-S1 area to be relatively unchanged. The significant change occurred in the L3-4 area where Dr. Pollock diagnosed a bulging disc, with protrusion, and marked stenosis. The CT scan indicated a virtual block at L3-4, which is a significantly different finding than that in 1991.

Dr. Pollock opined the change at the L3-4 level would indicate either a progression of his degenerative disc disease or an intervening trauma between the 1991 test and the 1993 test. These findings were all post-injury and Dr. Pollock opined it would be very difficult to relate this condition to the 1991 injury. Dr. Pollock indicated that he would be unable to say what restrictions would have been appropriate for claimant in 1991, but found it significant that Dr. Marsh had returned claimant to work in March of 1991, with no restrictions and with no functional impairment. Dr. Pollock felt claimant would require significant restrictions in 1993.

Claimant was also examined by Dr. Ely Bartal, a board-certified orthopedic surgeon in Wichita, Kansas. He noted claimant received no medical care from October 1, 1991, the approximate time of his layoff, through January 1993. Dr. Bartal had the opportunity to review Dr. Marsh's medical records from the 1991 treatment. Dr. Marsh did find degeneration at L4-5, L5-S1 but returned claimant to work without any restrictions. The results of the tests taken in 1993 indicated a significant difference in claimant's condition at the L3-4 level. Dr. Bartal diagnosed lumbar stenosis at L3-4, pathology which was not present during the 1991 MRI. When asked about a relationship between the L3-4 problems and the injury in 1991, Dr. Bartal indicated there was no relation between the two. He further testified the spinal stenosis found at the L3-4 level had been in existence less than two years and testified this happened sometime between 1991 and 1993. Dr. Marsh had returned claimant to work in 1991 without restrictions and Dr. Bartal felt this was appropriate. He attributed all of claimant's ongoing symptomatology to the stenosis at the L3-4 level. When asked to explain the L3-4 level stenosis, absent trauma, Dr. Bartal indicated that this type of condition can develop doing practically anything, including bending over, picking up your shoes, hitting a golf ball, from normal daily activity and can even happen overnight. He felt any problem claimant suffered in 1991 would have been a temporary condition only with no resultant permanency.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is on the claimant to establish his right to an award of compensation by proving all the various conditions upon which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The evidence in this matter is overwhelmingly in favor of the respondent's position that claimant suffered only a temporary aggravation of a degenerative disc disease in 1991. The symptomatology experienced by claimant in 1993 is attributable to an L3-4 spinal stenosis with bulging and encroaching disc, none of which was present in 1991. The evidence supports a finding that claimant suffered a temporary injury due to a fall at work in 1991, but fails to support claimant's allegation of permanent disability resulting from that accident.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 5, 1994, shall be affirmed in all respects and an Award is made in favor of the claimant, Harold F. Morris, and against the respondent, Associated Milk Producers, Inc., and the insurance carrier, American Motorist Insurance Company, for an accidental injury sustained on January 29, 1991, based upon an average weekly wage of \$246.77, for 6.57 weeks of temporary total disability compensation at the rate of \$164.52 per week for a total sum of \$1,080.90. As of the time of this Award the entire amount is due and owing in one lump sum minus any amounts previously paid.

Claimant is further awarded unauthorized medical expense up to \$350.00 upon presentation of an itemized statement for same.

Claimant is awarded payment of all authorized medical expenses incurred to date but denied additional medical care for the 1991 injury.

Claimant's attorney fee contract is hereby approved insofar as it is in accord with K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$243.40
Don K. Smith & Associates Deposition of Anthony Pollock, M.D.	\$259.50
Deposition of Jerry Hardin	\$319.50

Kelley, York & Associates, Ltd.	
Deposition of Ely Bartal, M.D.	\$213.86
Deposition of Karen Terrill	\$181.35
Deposition of Dwight Haddock	\$100.45
Deposition of Fred Newton	\$111.87

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kenneth M. Stevens, Attorney at Law, Topeka, KS  
John L. Carmichael, Attorney at Law, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director